No. 141.

Brief of Towne for Appellee.

SUPREME COURT OF THE UNITED STATES.

Filed Nov. 27, 1899.

OCTOBER TERM, 1899.

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CARRIE MOSS, APPELLANT,

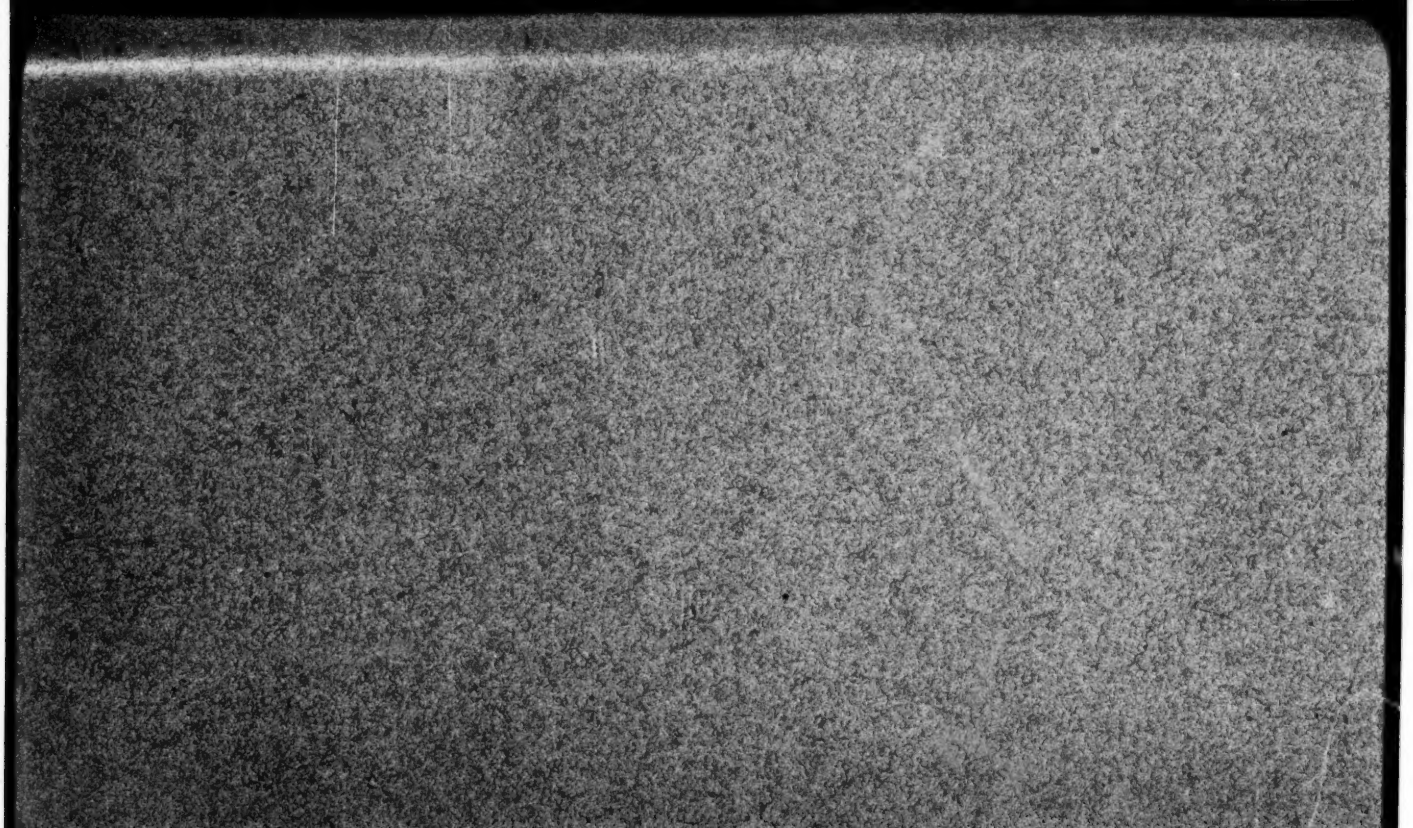
vs.

RICHARD DOWMAN, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

CHARLES A. TOWNE,
Counsel for Appellee.



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BRIEF FOR APPELLEE.

On May 7, 1890, one Robert H. Doran made homestead entry on the land in controversy, but did not at the time of entry or at any time afterwards make settlement upon the land or place any improvements thereon.

On October 24, 1890, the appellant induced the said Doran to execute a relinquishment of his homestead entry to the government, and on the same day the appellant filed said relinquishment and immediately thereafter made application to enter the said land as a homestead on her own behalf, which application was accepted by the officers of the local land office.

On the 19th day of September, 1890, a little more than a month before the appellant filed on said land, the appellee, Richard Dowman, settled upon said land, and on the 18th day of November, 1890, the appellee made application to enter said land as a homestead.

As this application was subsequent to the entry of the appellant the local officers neither allowed or rejected the application of the appellee, but on the 3rd. day of February, 1892, the Commissioner

of the General Land Office directed the local officers to order a hearing before themselves to determine the rights of the respective parties.

Under this state of facts it is perfectly apparent that the sole question for determination by the land department was whether the appellant or the appellee had the prior right of entry on the 24th. day of October, 1890, the day on which appellant made her filing.

The appellant claims that she was entitled to preference by reason of the purchase of the relinquishment from Doran and her filing made immediately upon the acceptance of said relinquishment.

The appellee claims that he was entitled to the preference for the reason that he settled upon the land more than a month before appellee made her entry; and while he does not claim that he could initiate any right to the land itself as long as it was covered by the homestead entry of Doran, he does contend that as soon as Doran's relinquishment was accepted, the land again became a part of the public domain, and that as he was a settler upon the land at that time his right to it attached instantly.

The position taken by the appellee has been upheld by the Secretary of the Interior, by the Circuit Court for Minnesota and by the Circuit Court of Appeals for the Eighth Circuit and the case is now brought before this court for final determination by Moss, the complainant and appellant.

At the time of writing this brief we have not received a copy of appellant's brief, and our references to the positions taken by counsel for appellant, therefore, necessarily refer to the brief used by him before the Court of Appeals.

The errors alleged in the bill of complaint are:

1. That appellee's residence and improvements were insufficient.

2. That there is no specific and affirmative finding of fact that appellee ever cultivated any portion of said land.

3. That there is no specific and affirmative finding of fact that appellee was actually upon the land in question at the instant that appellant offered her filing.

4. That conceding that appellee was on the land in question at the instant appellant offered her filing, it was error to hold that appellee had the prior right of entry, for the reason that appellee could initiate no right to the land while it was covered by Doran's entry, and that appellant having offered her filing at the same time

Doran's relinquishment was offered, that the two acts were simultaneous, and that, therefore, her right to the land attached instantly upon the filing of Doran's relinquishment.

The first question that presents itself for consideration is, to what extent will the courts review the decisions of the Secretary of the Interior.

It has been uniformly held that the land department is constituted a special tribunal, with judicial powers, to consider and determine all questions of fact relating to the settlement and acquirement of public lands, and that its decisions on all such questions of fact are final and conclusive and cannot be reviewed in either a court of law or of equity.

Lee vs Johnson, 116 U. S. 48. 29-570.

Quinby vs. Conlan, 104 U. S. 420, 26-802.

Vance vs. Burbank, 101 U. S. 514, 25-930.

Shepley vs. Cowan, 91 U. S. 330, 23-427.

The second reference is to the L. C. P. Co. Edition.

Of the four errors which appellant alleges in respect to the decision of the Secretary, three relate to the residence, improvement and cultivation made by the appellee, and to the question as to whether the appellee was actually upon the land at the instant appellant offered her filing.

These are all clearly questions of fact, and have frequently been held to be so by the courts.

Vance vs. Burbank, 101 U. S. 514, 25-930.

Shepley vs. Cowan, 91 U. S. 330, 23-427.

Quinby vs. Conlan, 104 U. S. 420, 26-802.

Lee vs. Johnson, 116 *U. S.* 48, 29-571.

Counsel for appellant in his brief admits the abstract proposition that the decision of the Secretary on questions of fact is conclusive, and we do not believe that he will contend that the questions of residence, improvements, cultivation and the question as to whether or not the appellee was actually upon the land at the instant appellant offered her filing are not questions of fact and controlled by the cases cited above.

But he seeks to avoid the effect of these decisions by alleging that the Secretary failed to make any specific and affirmative findings on these questions.

In paragraph 18 of the bill, Record page 13, complainant, referring to the decision of the Secretary, says: "And there is no finding of fact whatever therein, that the defendant at any time evercultivated any portion of the tract."

The best answer to this allegation is, that the question of cultivation was not an issue in the matter that was before the Secretary. The only question before the Secretary for determination was, whether appellant or appellee had the prior right to enter the land in question on the 24th day of October, 1890.

The matter in dispute between the parties did not arise on an offer of final proof, but on a contest initiated by appellee who claimed that he had settled on the land before appellant made her filing, and was entitled, therefore, to the prior right of entry.

The only question raised by this contest was as to the relative rights of the parties on October 24, 1890, and the only question of fact that could be involved in a determination of this question was whether the defendant had made actual settlement prior to that time. That this was the only question in the case is clearly shown by the opinion of the Commissioner, Record p. 21, as follows: "From an examination of the Record I find that Moss made her entry October 24, 1890; with her said application of entry was filed the relinquishment of one Doran, who had a prior entry thereon. Dowman applied to entry November 18, 1890, alleging settlement September 19, 1890. Said application was rejected for the reason that the land was embraced in the entry of said Moss. Said Dowman therefore filed an affidavit of contest against said entry of Moss, alleging that he was a settler upon said land in good faith, when Doran's entry was relinquished, and the entry of Moss allowed."

The Secretary was of the opinion that this was the only question in the case, for in his decision, Record p. 26, he says: "The only question to determine in this case is, whether Dowman was a settler in good faith at the time Doran's relinquishment was placed on file in the local office."

The question of cultivation could only arise on an offer of final proof, or on a contest specially instituted for failure to comply with the law as to cultivation.

The next allegation of error is stated in par. 12 of the bill, Record, p. 11, as follows: "Your orator avers and shows that the Secretary in his said decision did not find as a matter of fact, that defendant was upon said land upon the the 24th day of October,

1890, at the time of the entry by your orator, or that at any time upon said day, defendant made any act of settlement thereon."

Appellant does not say that the Secretary found that Dowman was *not* upon the land, but that he did not specifically and affirmatively find that that Dowman *was* on the land.

We are not aware of any provision of law, nor has appellant cited us to any, that makes it incumbent upon the Secretary to make specific findings of fact upon each material question of fact involved in a case presented to him for determination.

The Secretary stands in the same relation to the Land Department that an appellate court does to a *nisi prius* court; he is the final and supreme authority in that department, and it is customary with secretaries, as it is with appellate courts, to deliver their decisions in the form of general conclusions, rather than in the form of specific findings of fact and conclusions of law.

Suppose that the evidence on all material points in the case had been overwhelmingly in favor of defendant Dowman's contention, and the Secretary's decision had been as follows: "I have examined the record in this case and have decided that Dowman's entry should be allowed."

Such a decision would certainly have settled the rights of the parties so far as the Land Department was concerned, and would have been fully justified by the evidence. And yet, if appellant's theory is correct, she could have begun a suit in equity, overturned the decision of the Secretary and recovered the land, because the Secretary in his decision did not make specific findings of fact in favor of the party for whom he decided. In other words, that the appellee must suffer, not because of the insufficiency of his proof, not because he failed to comply with the law in all respects, but because of the failure of the Secretary to announce his decision in a particular way, a matter over which the appellee had absolutely no control whatever.

Referring to this point, counsel, on page 7 of his brief says: "We have, for the purposes of this hearing, the following established facts: first, that Doran's entry was cancelled and complainant's entry was completed as early as 11:30 a. m., October 24, 1890; second, that Dowman returned to the land on this last mentioned date; third, that his return was not earlier than 2 p. m."

Taking the foregoing as a premise, counsel deduces the following argument: first, that as a matter of law it was necessary for Dowman to have been in the actual physical possession of the land at the instant Moss offered her filing; second, that as Moss offered

her filing as early as 11:30 a. m., and as Dowman did not reach the land until 2. p. m., that therefore the Secretary erred in allowing Dowman's filing.

But counsel's statement of the facts does not agree with the record. On page 27 of the Record, the Secretary says: "But, the evidence does not not show, first, the exact time when the relinquishment of Doran was filed. Miss Moss in her testimony admits that she did not know the exact time when it was filed, and there seems to be considerable doubt on this point. Second. The evidence does not show that Dowman was not in the limits of his claim at the time it is presumed that the relinquishment was filed."

From this it clearly appears that the Secretary did not find that Moss made her filing before Dowman returned to the land.

Conceding that Dowman did not return to the land until a short time after Moss filed, we think the Secretary is clearly within the authorities when he says, Record, p. 26: "It is probably established doctrine in this department that has been upheld by a long line of decisions that are too numerous to cite, that necessary absences from a man's claim do not break the continuity of settlement or residence within the intention of the land laws, but that the settler, though actually absent, is constructively present upon the land to all intents and purposes. Therefore, even had Dowman not been actually within the limits of his claim at the instant the relinquishment of Doran was filed in the land office at Duluth, he was constructively upon the land, as that was his only home and his right attached before that of Moss' entry, just as surely as if he had been within the walls of his cabin. To hold otherwise would be both unreasonable and trifling; and therefore would not be sanctioned by law."

We submit, therefore, that the mere failure of the Secretary to make specific and affirmative findings upon all questions involved is not sufficient grounds upon which to predicate error.

It will be presumed that the decision of the Secretary is right unless it affirmatively appears upon the face of the proceedings that it is wrong.

As long as he is acting within the scope of his authority, a decision of the Secretary of the Interior stands upon the same basis as the judgment of a court at law, and every presumption will be indulged in to uphold it rather than to overthrow it.

To justify a court in overturning a decision of the Secretary the error must be clear and manifest, not possible or contingent.

Says the court in Quinby vs. Conlan, 104 U. S. 420, 26-802: "And we may also add in this connection, that the misconstruction of the law by the officers of the department, must be clearly manifest, and not alleged upon a possible finding of the facts from the evidence different from that reached by them."

And in Marquez vs. Frisbie, 101 U. S. 473, 25-801, the court says: "The language of this court in Moore vs. Robbins, cited above, is that equity will interfere when it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another."

"The meaning of this, and the sound principle, is, that when it is a mixed question of law and fact, and when the court cannot so separate them as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity, that on facts about which there is no dispute, or no reasonable doubt, those officers have, by a mistake of the law, deprived a man of his right, it will give relief."

We come now to a consideration of the only question of law raised by the bill, and the only question that can be considered and passed upon by this court.

That question is this: Conceding that Dowman was on the land in dispute as a settler at the moment Doran's relinquishment was filed, was he or appellant entitled to the prior right of entry?

This precise question has been before the Land Department on numerous occasions, but so far as we have been able to discover, has never been presented to, or passed upon by the courts, until this case arose.

In the Land Department there are two lines of decision on this question. Down to about 1883 the department held that when a piece of government land was covered by an entry and the relinquishment of an entryman was purchased by another, that if the purchaser offered to file at the same time he offered the relinquishment, the filing of the relinquishment and the filing of the entryman were simultaneous and one and the same act, and the new entrymen was given the preference over one who had settled on the land while it was covered by a filing. This has come to be known as the "simultaneous" doctrine.

From about 1884 down to the present time, the department has accorded the preference to the settler, on the ground that the moment the relinquishment is filed the land becomes again a part of the public domain and open to settlement, and that the right of

the settler, by reason of his occupation, attaches *eo instanti* upon the filing of the relinquishment. This has come to be known as the "*eo instanti*" doctrine.

This latter doctrine is upheld by the following decisions, as well as numerous others that might be cited:

Millis vs. Burge, 4 *L. D.* 446.
Wiley vs. Raymond, 6 *L. D.* 246.
Poole vs. Moloughney, 11 *L. D.* 197.
Zaspell vs. Nolan, 13 *L. D.* 148.
Stone vs. Cowles, 13 *L. D.* 193.
Fosgate vs. Blel, 14 *L. D.* 90.
Blauvelt vs. Masden, 18 *L. D.* 539.
Dowman vs. Moss, 19 *L. D.* 526.

See also the decisions of the United States Circuit Court in this case, Record, p. 46; and the decision of the Court of Appeals, Record, p. 57.

As the decisions of the Land Department on questions of law are not binding on the courts, we shall consider this question from the standpoint of reason, and shall attempt to show that the later decisions of the department are based upon better reasoning than the earlier ones are.

Appellant's contention is that Doran's entry segregated the land from the mass of public lands, and that while this entry remained in force no rights could be obtained by another settling upon the lands, and for the pusposes of this argument this may be conceded.

Appellee's contention is, that while it may be true that he could not initiate any right to the land so long as it was covered by a prior homestead entry, yet the moment the entry was relinquished it again became a part of the public domain and was open to the first settler or the first applicant.

But, appellant will reply, the relinquishment by Doran and the filing by Moss were simultaneous acts; there was no interim between, no lapse of time within which Dowman's rights as a settler could attach, and therefore Moss's entry should have been allowed.

But the acceptance of the relinquishment and the allowance of Moss's entry could not, in law, have been simultaneous acts.

Appellant has attempted to foreclose this question by alleging

that the land officers received and accepted the relinquishment and allowed the filing at the same instant of time.

This is a very convenient and comfortable doctrine for appellant to adopt, and it is absolutely essential for her to maintain and establish it in order to prevail in this case.

But we deny the right or authority of appellant to settle the rights of the parties to this litigation by the adoption and appropriation of the term "simultaneous," and we deny that the land officers have the power to give any legal effect to a transaction of this kind by any mere physical acts of their own.

The device is a cunning one, but it is more ingenious than ingenuous.

The question as to whether or not the acceptance of Doran's relinquishment and the allowance of Moss' entry were simultaneous acts is a question of law and not of fact.

If Congress had given the right to an entryman on government land to transfer and assign or relinquish his inchoate right to the land to another, then, undoubtedly, the divestment of the right of the entryman and the investment of the right in the person to whom he assigned or relinquished, would be simultaneous.

But Congress has given no such right. The entryman may sell and transfer his rights to any improvements he may have on the land, but he has no power whatever to control the disposition of the land itself. That right is retained exclusively by the government, and as a matter of fact when an entryman relinquishes his right to a piece of public land the relinquishment runs to the United States.

The General Land Office Circular for 1892, page 74, provides: "Relinquishments run to the United States alone, and no person obtains any right to the land by a mere purchase of the relinquishment of a filing or entry."

Judge Lochren, Record, page 48, speaking of the effect of the relinquishment, says:

"I think the secretary was clearly right. The idea that Doran by handing his instrument of relinquishment to the complainant for filing, even though for a large consideration, could invest the complainant with his rights or with any rights, is inadmissible. The filing of the relinquishment left the land open to appropriation; and the earliest appropriation of it under the land laws would attach to and hold the land. The arrangement gave the complainant opportunity to act quickly, but if the right of another attached more speedily she would fail. Dowman was then on the

land, an actual resident and settler. While Doran's entry continued Dowman could acquire no right by settlement, but the instant that entry was relinquished his right as settler attached, and no new entry however "simultaneous" with the relinquishment could be thrust in between Doran's relinquishment and Dowman's rights as a settler upon the land."

A very simple illustration will show the absurdity of the "simultaneous" doctrine contended for by appellant.

A, who is the owner of a piece of land, transfers the same to B, who in turn instantly transfers the same to C.

If the doctrine contended for by appellant is correct, then the divestment of title in A and the investment of title in C were simultaneous and occured at the same instant.

But if the divestment of title in A and the investment of title in C occurred at the same instant then there was no instant of time for the title to have rested in B, and there must have been such an instant of time, however infinitesimally small, for C obtains his title through B, or not at all, and if the title never rested in B, even for an instant, then C never could have obtained the title.

The illustration of the Circuit Court in this case is probably even better than the above. Judge Lochren, Record, page 48, says: "I will not dwell upon the argument urged by the complainant based on the alleged fact of the "simultaneous" delivery to and acceptance by the officers of the land office of Doran's relinquishment and complainant's application to enter. No two acts could be so simultaneous as to shut out the effect of a fact existing at the time. To illustrate. Suppose A for a valuable consideration paid him by B sells to B a tract of land, there being at the time a judgment against B docketed in the county. Before receiving his deed from A suppose B sells the same land to C, and that B makes his deed to C, handing it to A, with directions to deliver it to C, and also deliver A's deed of the land to B at the same time to C, and that both deeds are at the same time and in one envelope delivered by A to C, who passes both in the same manner to the register of deeds, and they are noted as received for record at the same hour and minute. The simultaneousness of these deliveries will not prevent the lien of the docketed judgment upon the land, as the land of B under A's deed to him, although delivered simultaneous with his own deed to C."

These illustrations are exactly parallel with the facts in this case, for while the parties in a land matter are not dealing with absolute title, still they are dealing with inchoate rights of property

recognized by the government, and these have to be granted or relinquished with as much formality as the transfer of title in fee between individuals.

In the case at bar Doran first relinquished his inchoate right to the land to the government, and then the government granted or conveyed this inchoate right to Moss.

But following out the analogy pursued in the illustration of the transfers between A, B and C, the government must have been reinvested with the complete title to the land before it could invest Moss with this inchoate right; and if the reasoning in the illustration cited above is good, then the complete title must have rested in the government momentarily, at least, before the government could confer upon Moss the right to acquire this inchoate right.

As long as Doran's filing was in full force and effect the government had no right or authority to permit Moss, or any one else, to file upon the land.

After Doran had been allowed a homestead entry it was necessary for him to relinquish his right and necessary for the government to *accept* the relinquishment *before* it could allow another entry on the land.

And it is utterly absurd and illogical to say that the acceptance of Doran's relinquishment and the allowance of Moss' filing were simultaneous and one and the same act, for the reason that, under the statutes of the United States, Doran's rights to the land must be completely wiped out *before* the government has any right or authority to permit any other filing. Doran's rights must absolutely *cease* before the government can allow another filing, and this could not be so if the acceptance of the relinquishment and the allowance of the subsequent filing were simultaneous and one and the same act.

The acceptance of the relinquishment by the government is a separate, distinct and independent act and cannot be fused or coalesced with the act of allowing a subsequent entry, for the relinquishment must have its full legal effect before the land officials have any right to allow a subsequent entry.

The mere fact that the physical point of time between the acceptance of the relinquishment and the allowance of the subsequent entry is so slight as to be inappreciable, or even incomprehensible, does not militate against the argument.

If in a transfer of title between three persons, as for instance from A to B and B to C the title must at some time rest in B be-

fore he can transfer it to C, then it follows as a matter of logic that the title must remain in B an actual, given length of time, however infinitesimally small it may be.

Philosophers tell us that light moves at a rate of 190,000 miles a second.

If this be true it is beyond the power of the human mind to conceive, and is beyond the ingenuity of man to devise any instrument that would measure the length of time it takes a ray of light to travel an inch.

And yet we know as a matter of logic that it must be true, that if it takes a ray of light a second to travel 190,000 miles, it must take an actual, physical point of time for a ray of light to travel the twelfth part of a foot.

It would be just as reasonable, just as logical to say that a beginning could be coincident with an end, or that three different objects could occupy the same physical point in space at the same time, as to say that A could transfer a title to B and B to C and that the divestment of title in A and the investment of title in C are simultaneous and occur at the same instant of time.

If appellee's contention is right then there was a lapse of a certain length of time between the relinquishment of Doran and the filing of Moss; and as Dowman was on the land, in the actual physical occupation of it, according to the decision of the Secretary, Dowman's settlement preceded Moss' filing by the length of time that must have elapsed between the acceptance of the relinquishment and the allowance of Moss' filing.

If Dowman had not entered on the land while it was covered by Doran's filing, but had settled on the land at the very instant that Moss offered to file, there can be no question but that Dowman would have been entitled to the preference.

The method of procedure laid down in the General Land Office Circular for 1892, p. 10, and followed in the later circulars, in cases of simultaneous applications, is as follows:

"In cases of simultaneous applications to enter the same tract of land under the homestead laws, the rule is as follows: First, where neither party has improvements on the land the right of entry should be awarded to the highest bidder. Second, where one has actual settlement and improvement and the other has not, it should be awarded to the actual settler. Third, where both allege settlement and improvements, an investigation must be had and the right of entry awarded to the one who shows prior actual

settlement and substantial improvements so as to be notice on the ground to any competitor."

We do not understand that counsel for appellant contests this, but he contends that as Dowman settled on the land while it was covered by Doran's filing he was a trespasser and thereby lost rights which he otherwise would have had, and that this act of trespass prevented him from becoming a qualified applicant for the land.

This is the reason assigned by the long list of authorities cited by counsel which uphold the "simultaneous" doctrine.

But neither has any of these authorities, nor has counsel cited us to any provision of the statutes or a decision of the courts conferring upon the officers of the Land Department the power to deprive citizens of their property, or property rights, because of crimes and misdemeanors committed by them.

Certainly the officers of the Land Department can have no such inherent power, and if they possess it at all it must have been conferred by specific authority of the lawmaking body.

Even a court of equity would possess no such power as this.

Says Story in his Equity Jurisprudence, section 182: "It is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights."

This doctrine, contended for by counsel, and upheld by the earlier decisions of the Land Department, is a species of attainder.

But that piece of ancient legal outlawry has never been favored in this country, is constitutionally prohibited, and even in the cruel days of old was only resorted to in cases of treason and felony and not for petty misdemeanors.

Conceding that Dowman was a trespasser at the time he entered on the land, he was a trespasser only as to the government and Doran, and not as to Moss, and the trespass against Doran ceased the moment the latter's relinquishment was filed.

Judge Lochren, Record, page 48, speaking of this point, says: "That Dowman had acquired no rights by his settlement prior to Doran's relinquishment, and might as respects Doran have been regarded as a trespasser makes no difference. When Doran relinquished Dowman ceased to be a trespasser, and was not only an actual but a lawful settler. There was no evidence of mala fides about Dowman's settlement which should effect its legality when the time came for a right to attach to it under the land laws."

The act of trespass is undoubtedly an offence against the laws of the country, but the law has also specifically provided the punish-

ment therefor. The trespasser may be proceeded against criminally, or he may be prosecuted civilly for the damages sustained.

These are the only penalties provided by law, and we submit that there is no inherent power in the officers of the Land Department to deprive a man of his civil rights for the commission of the comparatively insignificant offence of settling upon government land while it is covered by the entry of another.

Counsel's apparently serious contention that such an act of trespass deprives the trespasser of the right to acquire the land trespassed upon, suggests some interesting inquiries.

If the act of trespass operates in this way, why would not the commission of any other offense operate in the same way? The act of assault and battery for instance.

Assault and battery is an unlawful act and an offense against the laws of the country. But would counsel contend that if Dowman had committed assault and battery on Doran the moment before Doran filed his relinquishment that that act would, in any way, have restricted or limited Dowman's right of entry? Hardly.

And yet, if not, why not?

The act of assault and battery would have been as heinous and as much of an offense against the laws of the country as the act of trespass.

Again, does counsel contend that the act of trespass operates to prevent the trespasser from acquiring government land generally, or only that it prevents him from acquiring the particular piece of land on which he has trespassed?

If counsel says that it only operates to prevent the trespasser from acquiring the particular piece of land upon which the trespass was committed, then the query arises, why? If the act is one that merits such condign punishment why limit it to the denial of the right to acquire the particular piece of land, instead of extending it to all public lands?

Another consideration.

Does the commission of this offense take away from the trespasser the right to acquire government land for all time or does it only deprive him of such right temporarily?

And if counsel answers that it only deprives him of the right temporarily then who is to decide when he has become sufficiently purged of his offense and in what way and by what tribunal are his rights to be restored?

In the absence of any specific provisions of statute showing how the act of trespass operates upon the right of an individual to

acquire government land, it seems to us that it is incumbent upon counsel for appellant to answer these questions.

Up to this point in the argument we have attempted to show that even if Dowman was a trespasser as to Doran it would not have deprived him of his right to the land the instant that Doran filed his relinquishment.

But we deny that Dowman was even a technical trespasser either as to Doran or the United States.

A careful examination of the Revised Statutes will disclose the fact that sections 2461 and 5388 are the only provisions of law that in anyway prohibit third persons from going upon or interfering with public lands. Both of these section refer to the destruction of timber upon public lands and, therefore, have no bearing upon the case at bar.

The effect of these sections is discussed and determined in the cases cited below, and these authorities hold that the only prohibitions against trespass upon the public lands are contained in these two sections.

Leatherbury vs. U. S. 32 *Fed. Rep.*, 780.

U. S. vs. Garretson, 42 *Fed. Rep.*, 22.

U. S. vs. Konkapot, 43 *Fed. Rep.*, 64.

If Doran had made actual settlement upon the land and had placed improvements thereon, and Dowman had then entered upon the premises and torn down Doran's fences or buildings or had destroyed his crops, undoubtedly Doran would have had a right of action for trespass.

But even such action as this upon the part of Dowman would not have been an offense against the laws of the United States, but against the laws of the State of Minnesota. Neither the land department nor the United States Courts would have had jurisdiction of such an action, but Doran would have been remitted to the state courts for his remedy.

The federal Courts have decided time and again that all improvements placed upon public lands by settlers are personal property, and that the state courts have exclusive jurisdiction of all actions involving the right of possession to such property or for injuries thereto.

But if such a trespass was in violation of the laws of the United States it would follow as a logical sequence that the federal courts would have at least concurrent jurisdiction of such offenses.

By the decision of the Secretary it appears that Doran had never made any settlement or improvement on the land. Dowman, therefore, was not even a technical trespasser under the state laws.

Counsel for appellant practically admits that if Dowman had not entered on the land while it was covered by Doran's filing, but had made made settlement the very instant that Moss offered her filing, that Dowman would have been entitled to the preference, for the reason that as between a simultaneous entry and settlement both the law and the circulars of the General Land Office favor the actual settler.

Counsel has, therefore, rested his whole case upon the proposition that Dowman's entry on the land while it was covered by Doran's entry was a trespass, a wrongful act and that by such wrongful act he was deprived of rights which he would otherwise have had, and that the land department had the right to punish him for such wrongful act by denying to him the right to file upon said land when it again became subject to entry by virtue of Doran's relinquishment.

But as we have shown that under the laws of the United States such an entry as Dowman made was not even a technical trespass; and as the land department would not have had the right to deprive him of any of the civil rights granted to him by the public land laws, even if it had been a trespass, appellant's whole case must fall to the ground.

If there ever were circumstances which would justify a person in making a settlement on government land which was already covered by filing; they certainly existed in this case.

It appears from the opening paragraph of Secretary Smith's decision, Record, p. 24, that this land was covered by the homestead filing of six different persons from February 6, 1885, to September 19, 1890, the time Doran settled on it.

It also appears from the Secretary's decision, Record, bottom of p. 27, that none of these persons entered the land in good faith, but for the purpose of speculation. It also appears on the same page that none of them had ever made any settlement upon the land whatever, and that Dowman was aware of this fact, and that was the reason why he settled upon the land, believing that that was the only way he could acquire it.

It also appears from other parts of the Record, p. 20, that he had attempted to acquire the land previous to his settlement by instituting a contest, and that this contest was still pending at the

time of his settlement in September, 1890, and was not decided until November, 1891.

It may be the policy of the government to prevent trespasses upon the public lands, but it is no less the policy of the government to prevent speculation in the public lands.

It is a perfectly warrantable conclusion from a reading of the record that none of the six persons who entered this land, previous to Dowman's settlement had the slightest idea of ever making it their home; and while the Secretary in his decision does not say so in so many words he plainly intimates that in his opinion the land had been withdrawn from the market for the purpose of speculation.

It plainly appears that at least one of these persons, Doran, received $1000 for his relinquishment, although he had never expended a dollar in improvements and for aught that appears had never seen the land.

And if Dowman had not settled upon the land and broken up this chain of speculation it might have continued yet and could have continued indefinitely.

He is the first honest homesteader that ever attempted to acquire the land and under these crcumstances we think it devolves upon counsel for appellant to show us some specific provision of law that denies to a technical trespasser the right to acquire public lands, before it can be claimed that he has forfeited his right to this land by the manner in which he attempted to gain it.

Judge Lochren in his decision, Record, p. 48, well says: "Neither Doran nor the long line of speculative homesteaders who had kept up holdings by entries and relinquishments every six months, had ever appeared on the land. The object of the homestead laws is not to encourage speculation, but settlement, and if Dowman knew all the antecedent facts, he might well expect that an actual settler would acquire the right to the land, lawfully, upon the next relinquishment, and make his settlement, as the Secretary finds as a fact that it was made, in good faith."

Counsel in his brief says: "that Moss purchased the relinquishment in good faith, and that she had no knowledge of Dowman's settlement and improvement. But under the land laws Doran had no interest in the land itself which he could transfer or assign to Moss, and even if he had, it is a principle of law too well established to require the citation of authorities to support it, that one who purchases an interest in land takes it subject to the rights of one in possession.

As we have heretofore shown, both Secretary Smith and Judge Lochren have found that the entrymen who preceded Moss had not taken the land in good faith, but for the purposes of speculating in the sale of the relinquishments.

The status of the purchaser of the relinquishments under such circumstances is thus laid down in the General Land Office Circular for 1892, page 74: "Relinquishments run to the United States alone, and no person obtains any right to the land by mere purchase of the relinquishment of a filing or entry. Entries and filings made for the purpose of holding the land for speculation and the sale of relinquishments are illegal and fraudulent, and every effort in the power of the government will be exerted to prevent such frauds and to detect and punish the perpetrators. Purchasers of the relinquishments of fraudulent filings or entries should understand that they purchase at their own risk so far as the United States is concerned, and must seek their own remedies under local laws against those who, by imposing such relinquishments upon them, obtained their money without valuable consideration."

Such being the law, appellant is hardly in a position to plead that she was a purchaser in good faith and that she was ignorant of the fact that defendant had settled on the land in question.

Another point made by counsel is that it was necessary for Dowman to have made a new and independent act of settlement, after the filing of the relinquishment, in order to enable him to initiate a right to the land.

In other words, counsel seriously contends that as Dowman's original settlement was in the nature of a trespass, and as he did not make another settlement after Doran's relinquishment, that he is not entitled to the land; but that if Dowman had stepped over the border just after Doran filed his relinquishment, and had solemnly announced, in the wilderness where he was located, that he renounced all claim to the land under his original settlement, and then had instantly returned to it with the intention of acquiring it, that he would have been rehabilitated with all the rights of citizenship.

As to what good purpose this proceeding would have subserved, or as to what mandate of the law it would have been in response to, counsel is discreetly silent.

We think it requires but little argument to show that Congress never intended to declare that it was necessary for one who was a trespasser at the time of his original settlement, to go through the idle ceremony of leaving the land and renouncing his original

settlement, after the land had again become open to settlement, in order for him to lawfully initiate a right to the land.

Such a proceeding would not advance any public or private purpose. It would not in any way have benefitted Doran; it would not have endowed Dowman with any further or addditional qualifications as a settler, and the wisdom of the public land policy of the general government would not have been demonstrated or vindicated by it, and the only possible virtue that we have been able to perceive in it is the general moral benefit that is supposed to result to the sinner from the public confession and renunciation of his criminal act.

It is inferentially held by all of the authorities upholding the "*eo instanti*" doctrine, heretofore cited, that no new act of settlement is required under such circumstances.

The following cases hold this doctrine specifically:

Kaster vs. Benz, Lester L. D. 418.

Peterson vs. Kitchen, Copps. L. O., Vol. 1-3, 181.

McAvinny vs. McNamara, 3 L. D. 553.

Counsel contends that complainant's position is sustained by Wood vs. Beach, 156 U. S., 548. The Court of Appeals in this case has completely answered this and it is not necessary for us to add anything further. See Record, p. 61.

Finally, the mistake of law on the part of the officials in the Land Department must be gross in order to justify the courts in setting aside a patent.

U. S. vs. Marshall Silver Mining Co., 129 *U. S.,* 579-32-737.

U. S. vs. Maxwell Land Grant Co., 121 *U. S.,* 325-30-958.

It seems to us, therefore, that both reason and authority sustain the position of defendant, and as it appears that this doctrine has been uniformly npheld in the department for the past fifteen years, it should be upheld by the courts even though it is considered that the department was originally wrong in taking this position, for it has passed into and become a rule of property, and there is no telling how many titles might be unsettled if the ruling of the department on this point should now be reversed.

Respectfully submitted.

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